Supreme Court, U.S.
FILED
OCT 10 2002
CLERK

No. 02-308

IN THE

Supreme Court of the United States

NICK MARINO,

Petitioner,

—v.—

KENOFF & MACHTINGER, LLP,
JAY KENOFF AND LEONARD MACHTINGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. PRELIMINARY STATEMENT

Respondent concedes that Section 301 (a) of the Labor Management Relations Act, 29 U.S.C. § 185, does not permit a state court to actively interpret a collective bargaining agreement ("CBA"), which task is within the *exclusive* jurisdiction of the federal courts. Respondent further concedes that the state court, in conducting an evidentiary "mini-trial" for the purpose of interpreting the CBA, ignored binding federal authority construing that very CBA, on the same facts, and between the same parties. Turning a blind eye to controlling federal authority on an issue within the exclusive jurisdiction of the federal courts is both a violation of the principle of *stare decisis* and the Supremacy Clause of the United States Constitution.

II. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS ACTED IN EXCESS OF SUBJECT MATTER JURISDICTION

A. Complete Preemption is an Exception to the Well Pleaded Complaint Rule

Respondent argues that Petitioner "chose" the state forum and should not now be heard to complain. No choice was presented,[1] nor would such choice have

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[1] There was no "choice of forum" as suggested by Respondent Brief in Opposition to Petition for Writ of Certiorari ("Opposition"), at p. 4. Petitioner was compelled to file claims arising from the mishandling by Respondent of his credit

the effect of conferring subject matter jurisdiction where none may be had. The interpretation of a CBA is reserved *exclusively* to the federal courts, Congress having provided for the *complete preemption* of this subject matter. *Lydon* v. *Boston Sand & Gravel*, 175 F.3d 6 (1st Cir. 1999). No concurrent jurisdiction is possible. "Not only have they conferred jurisdiction... on the federal courts, but they have also *prohibited* state courts from hearing them. *Lydon*, at p. 14 (emphasis added).

Respondent mis-cites the "well pleaded complaint rule." Opposition at p. 5. Quoting selectively from *Caterpillar* v. *Williams*, 482 U.S. 386, 398-399 (1987), Respondent argues that a well pleaded complaint which does not reveal a federal cause of action on its face cannot be removed upon the interposition of a federal defense. Opposition at p. 5. However, this Court, in its *Caterpillar* opinion, noted the exception not revealed by Respondent's redacted quote:

> "There does exist, however, an 'independent corollary' to the well-pleaded complaint rule, [] known as the 'complete pre-emption' doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state commonlaw complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'

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determination arbitration under the Writer's Guild of America ("WGA") collective bargaining agreement ("CBA") in state court. No diversity of jurisdiction existed; the claims were common law malpractice claims.

Metropolitan Life Insurance Co. v. *Taylor*, 481 U.S. 58, 65 n.8 (1987). "

Caterpillar v. *Williams*, supra, at p. 327. When "the heart of the complaint [is] a ...clause in the [CBA]" that complaint arises under federal law. *Avco Corp.* v. *Machinists*, 390 U.S. 557, 558 (1968). Were the state court merely to *enforce* the CBA by application of the Ninth Circuit's interpretation of the WGA CBA, a state cause of action would be presented. When the state court determined that Respondent's liability was *contingent upon* and required *active interpretation* of that CBA, it had two permissible options: declining jurisdiction or adhering to the Ninth Circuit opinion.[2] "Section 301 governs claims founded directly on rights created by [CBAs] as well as claims 'substantially dependent on analysis of a-[CBA].'" *Caterpillar*, supra at 394, citing *Electrical Workers* v. *Hechler*, 481 U.S. 851, 859, n.3 (1987).[3]

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[2] Respondent also fails to state that this Court, in *Caterpillar*, expressly did *not* decide whether, *in a case of complete preemption*, removal may be based upon a defense requiring interpretation of a CBA. "We intimate no view on the merits of this or any pre-emption arguments discussed above." *Caterpillar*, supra at p. 398, n. 13.

[3] Respondent also misapprehends the facts of *Caterpillar*, supra, in which defendant argued that a suit for wrongful termination based on implied contracts of employment were subsumed into a CBA when the plaintiffs returned to their collective bargaining unit. This Court observed that the CBA played no part in the implied agreements and the CBA would not need to be examined. The Court also held that the individual contracts were not "subsumed" in the CBA as a matter of law. *Caterpillar*, supra at p. 395, n. 9.

B. The CBA Provisions Control the Credit Arbitration Procedures

Petitioner's instant claims are the product of the Ninth Circuit decision. Petitioner, in prior federal litigation against the WGA for breach of the CBA and the WGA's duty of fair representation, obtained a published opinion articulating the meaning of the credit determination procedures under the CBA. *Marino* v. *Writers Guild of America, East, Inc.*, 992 F.2d 1480 (1993).

That decision makes clear that Petitioner raised serious question as to whether his arbitration -- which included no confrontation of witnesses, cross-examination of witnesses, contemporaneous record, and which was conducted by an anonymous panel of arbitrators acting in secret, represented a breach of the duty of fair representation by WGA to its member[4] and/or a breach of the CBA. The Ninth Circuit concluded that the WGA did provide some procedures guaranteeing a modicum of fairness but that Respondent *failed to request them* on his behalf or *to protest timely* the anonymity of the arbitrators.

Petitioner proceeded to the California court with his malpractice claims, based upon the Ninth Circuit's holding that his attorneys, self-avowed "experts" in this area of entertainment law, had not availed of the procedural safeguards permitted under the CBA. Petitioner could not have anticipated that Respondent

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[4] The duty of fair representation doctrine serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967).

would produce testimony at a mini-trial directly contradicting the findings and conclusions of the Ninth Circuit about the meaning of the CBA procedures. Nor could he anticipate, *ab initio*, that the trial court would ignore the Ninth Circuit decision and undertake a *de novo*, active interpretation of the CBA and rules promulgated thereunder.

Respondent contends in its Opposition -- for the first time -- that the trial court only interpreted the Credits Manual and not the CBA, a claim unsupported by the record. Respondent has previously admitted that the trial court did, in fact, "interpret the CBA"[5] and should be estopped to contend otherwise. Respondent specifically conceded that the Credits Manual is a "part of [the] collective bargaining agreement."[6]

C. Petitioner Preserved His Objections and is Not Estopped to Raise Them

Petitioner consistently objected to the conduct of the mini-trial, particularly emphasizing that the trial court was departing from the Ninth Circuit's opinion in

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[5] See, e.g., Respondent Kenoff & Machtinger's Answer to Petition for Review, at p. 8: "In addition, K & M filed Motion in Limine No. 7 in which it sought to bifurcate the trial so *that the interpretation of the WGA Credits Manual (which is a part of a collective bargaining agreement and a pure matter of contract interpretation controlled by federal law)* would be tried by Judge Hiroshige as a bench trial." See also, id., at p. 9: "Beginning on March 17, 2000, and continuing on March 20, April 12, 13, and 17, 2000, Judge Hiroshige conducted a 5-day bench trial concerning the *interpretation of the collective bargaining agreement* with respect to the Phase I Hearing Issue." (Emphasis added.)

[6] See fn. 1, supra.

Marino as to the meaning of the "Phase I" hearing in the credit arbitration.[7]

D. Estoppel Will Not Defeat the Assertion of a Claim of Complete Preemption

More importantly, a claim that the state court acted in excess of its subject matter jurisdiction may be raised at any time. Equitable estoppel will not lie to defeat a claim that jurisdiction was exceeded. Where preemption is complete, the issue is jurisdictional and may be raised at any time. *International Longshoreman's Association* v. *Davis*, 476 U.S. 380, 480 (1986).

E. The Longevity of the Litigation is Immaterial to the Merits of this Petition

Respondent makes multiple references to the length of this litigation, insinuating that is informative of the merits of this Petition. The fact that state courts acted in excess of jurisdiction for an appreciable time does not create jurisdiction in those courts in violation of federal labor law.[8]

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[7] He objected to the admission of evidence, adduced by Respondent through volunteer "expert" witnesses from the WGA, that the Phase I hearing did not include the full panoply of procedural rights described by the Ninth Circuit. No equitable estoppel will lie on these facts.

[8] Petitioner has vigorously pursued his rights, including appeal rights, for several years, during which time, he *succeeded on his first appeal*, reversing the trial court's improvident grant of summary judgment, only to return to the same trial judge who again granted partial summary adjudication, conducted a mini-trial in excess of his jurisdiction, and deprived Petitioner of a trial on all causes of action against Respondent.

III. REVIEW SHOULD BE GRANTED BECAUSE THE STATE COURTS FAILED TO ADHERE TO BINDING FEDERAL PRECEDENT

Respondent argues that the trial court's interpretation of the CBA was "consistent" with that of the Ninth Circuit. This is simply not true. The Ninth Circuit observed that during Phase I of a credit arbitration, "common factual disputes" would be tried, at an evidentiary hearing, with confrontation and cross-examination of witnesses, the parties to be represented by counsel. Such "common factual disputes" were found to include disputes as to "authenticity, identification, sequence, authorship, or completeness of any literary material to be considered." *Marino*, supra, at p. 1482.[9] Had such procedures been requested by Respondent on his behalf, Petitioner would have, *inter alia*, confronted the purported screenwriters, Francis

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[9] "[A] special committee conducts 'a hearing at which all participating writers may present testimony and documentary evidence.' Manual, Credit Determination Procedure (CDP) § D.4. That committee's factual determination is binding and forms a part of the basis of the material that goes to those who conduct the second phase of the process." *Marino*, supra, at p. 1482. Respondent argued that a Phase 1 hearing is limited to "an inquiry into which participating writer wrote the particular story, treatment or script in question such that the writer's name should appear on the title page for purposes of submitting to the Arbiters in Phase 2." Minute Order, dated January 11, 2000, attaching Tentative Ruling, Motion for Summary Judgment as to the Phase I Issue, Etc.," undated. This conclusion was adopted by the trial court and appeals court and is quite different from the procedure for resolution of "factual disputes" found to exist by the Ninth Circuit upon examination of the same materials: the CBA, WGA Credits Manual, and affidavits of the parties.

Ford Coppola and Mario Puzo, and vigorously cross-examined them as to their "authorship" of the materials -- the heart of any credit dispute. The state court held that no such rights exist in the CBA. Moreover, on the arbiter anonymity issue, not reached by the Ninth Circuit, Respondent contends that the state court was compelled to follow *Ferguson* v. *WGA*, 226 Cal.App.3d 1382 (1991). As explained in the Petition, *Ferguson* suffers from the same infirmity as presented here, a state court acting in excess of jurisdiction on a Section 301(a) claim.

IV. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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